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No. 97-129

In the Supreme Court of the United States

OCTOBER TERM, 1997

HONORABLE L. L. SAWYER, Judge of the Circuit Court of the State of Oregon for Jackson County,

Petitioner,

v.

STATE OF OREGON ex rel MARK HUDDLESTON, District Attorney for Jackson County,

Respondent.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondent State of Oregon claims that events occurring subsequent to petitioner Judge Sawyer's filing of his certiorari petition moot this case. This mootness claim raises a "new point[]" which authorizes this reply brief. Supreme Court Rule 15.6.

The primary basis for the state's mootness claim is Judge Sawyer's subsequent compliance with the Oregon Supreme Court's peremptory writ of mandamus. The writ

> commanded [the judge] forthwith to enter a corrected judgment in the case of State v. [Bobby Ron] Vanzant, . . . imposing the [75-month prison] sentence for the crime of second degree manslaughter required by [Ballot Measure 11].

Petition for Writ of Certiorari at App. 74-75, State ex rel. Huddleston v. Sawyer, 324 Or. 597, 932 P.2d 1145 (1997), petition for cert. filed sub nom. Sawyer v. State ex rel. Huddleston (July 21, 1997) (No. 97-129).

In his certiorari petition, Judge Sawyer apprised this Court that at an ensuing hearing, he would comply with the peremptory writ's command, and resentence Vanzant. Petition for Writ of Certiorari at 4 n. 2, at 16 n. 3. The judge complied at a July 30, 1997 resentencing hearing. But before imposing the 75-month Measure 11 sentence, he stated that "the Oregon Supreme Court has said that Measure 11 is facially constitutional. I don't agree with them obviously." July 30, 1997 Tr. 17. Although he acknowledged that "I am bound by [the Oregon Supreme Court's] rulings," id., the judge also said that 75 months is "not a sentence I would impose without [Measure 11], given the facts of the case . . . ." Id. at 18.

Judge Sawyer thus made clear that absent the writ's command, he would not give Vanzant a 75-month Measure 11 sentence. Instead, he would stand by the 20-month guidelines

sentence he originally imposed. According to the state, Judge Sawyer's "compliance with the writ of mandamus" moots the case, for it "completely extinguished the sole basis for saying that [he] had standing to petition for certiorari--the threat of sanction if he refused to comply." Respondent's Brief in Opposition at 8. Thus, the state claims, the judge has no legally cognizable interest in the case (and also may lack standing to pursue the claim). As will be explained below, the state's mootness claim is factually and legally untenable.

But before beginning that explanation, a preliminary point is in order. While this case was in the Oregon Supreme Court, the state advanced several arguments against the court's jurisdiction over the merits of Judge Sawyer's Guarantee Clause claim. Among them was that **this** Court could not be "final arbiter" on the accuracy of the state court's decision on this particular type of federal question. See Brief in Opposition at 19-21 (renewing argument).

By now urging this Court to deny certiorari, the state oscillates. The Oregon Supreme Court agreed with the claim that state courts lack jurisdiction over the merits of this particular type of federal question. The ineluctable consequence of the state's opposition to certiorari is that this Court would not be "final arbiter" on the accuracy of the Oregon Supreme Court's decision on a federal question.

A. Petitioner's Legally Cognizable Interest in a Viable Issue

In his certiorari petition, Judge Sawyer asks this Court to review the Oregon Supreme Court's holding that it lacked jurisdiction to decide the judge's claim that Measure 11 is invalid under the republican Guarantee Clause. U.S. Const. Art. IV, § 4. The case is moot only if the issue is dead, or if Judge Sawyer has no legally cognizable interest in it. Murphy v. Hunt, 455

U.S. 478, 481 (1982). State and federal law make clear that the case is not moot.

In State ex rel. Motor Vehicles Div. v. Norblad, 320 Or. 307, 882 P.2d 598 (1994), relator Motor Vehicles Division (MVD) suspended licensee/intervenor McBride's driver's license. McBride's attorney persuaded defendant Judge Norblad to order MVD to rescind its suspension of McBride's license. A few days later, MVD rescinded the suspension, but simultaneously asked the judge to vacate or stay his order requiring the rescission. After the judge denied MVD's vacate-or-stay request, MVD sought mandamus relief in the Oregon Supreme Court. 320 Or. at 310-11.

On mandamus, McBride claimed that MVD's rescission of its suspension order mooted the case. Id. at 311. In rejecting that claim, the Oregon court said,

> "An agency can withdraw an order completely." MVD exercised that authority when it rescinded its . . . suspension order. MVD's sole purpose in rescinding its suspension order was to comply with defendant judge's order while contesting the validity of the order through other legal channels. Under the circumstances, we are satisfied that defendant judge's order has a continuing effect on MVD's actions vis-a-vis [McBride]. Accordingly, the dispute is not moot.

Id. at 312 (quoting State ex rel. Hall v. Riggs, 319 Or. 282, 293, 877 P.2d 56 (1994)).

Norblad establishes that the dispute in the case sub judice too is viable. Judge Sawyer's "sole purpose in" resentencing Vanzant "was to comply with" the Oregon Supreme Court's peremptory writ of mandamus "while contesting the validity of the [writ] through other legal channels," i.e., certiorari. Id. at

312. Furthermore, there most certainly is something to contest in the judge's case.

Presently, there is no decision on the merits of Judge Sawyer's Guarantee Clause claim. Thus, his case presents a viable issue: Is the judge's Guarantee Clause claim correct, thus invalidating both the peremptory writ and Bobby Ron Vanzant's Measure 11 sentence? Or is the judge's Guarantee Clause claim incorrect, thus validating the writ and Vanzant's Measure 11 sentence?

Furthermore, Judge Sawyer has a legally cognizable interest in the issue. The judge based one of his alternative claims against Measure 11 on the Oregon Constitution's separation of powers. He argued that in cases such as Vanzant's, where the measure completely removes judicial discretion in determining the appropriate sentence, the measure "'eviscerates the judiciary's inherent (historically shared) sentencing powers.'" Sawyer, 324 Or. at 614.

In rejecting the claim, the Oregon court explained that with the exception of contempt of court situations, "the 'power to declare what punishment may be assessed against those convicted of crime is not a judicial, but [exclusively is] a legislative, power.'" Sawyer, 324 Or. at 615 and n. 13 (quoting State v. Smith, 128 Or. 515, 524, 273 P.2d 323 (1929)).

> "When a court acts beyond the bounds of its sentencing authority, it infringes upon the power of the legislature to determine the manner of punishment. A sentence must be in conformity with the governing statute; any non-conforming sentence is void for lack of authority and thus totally without legal effect." (Citations omitted.)

Sawyer, 324 Or. at 615 (quoting State v. Leathers, 271 Or. 236, 240, 531 P.2d 901 (1975)).

State v. Leathers reiterates the "general rule" in Oregon that if a sentencing court imposes a legislatively unauthorized sentence, "'the judgment . . . is illegal and void, [for] the trial court has not exhausted its jurisdiction since it has in fact failed to pronounce any sentence.'" 271 Or. at 240 (quoting Gladden v. Kelly, 213 Or. 197, 200, 324 P.2d 486 (1958)). If the court discovers that it has imposed an invalid sentence, the court has "the duty to take corrective action and to impose a valid sentence." Leathers, 271 Or. at 240. Cf. United States v. Morgan, 346 U.S. 502, 506 (1954) (describing similar authority for federal courts). The court may do so, even if the case is on direct appeal. Or. Rev. Stat. § 138.083 ("[t]he sentencing court shall retain authority irrespective of any notice of appeal after entry of judgment of conviction . . . to delete or modify any erroneous term in the judgment"). See State v. Graham, 143 Or. App. 85, 87-88, 923 P.2d 664 (1996) (explaining Or. Rev. Stat. § 138.083). Moreover, the court may "take corrective action and impose a valid sentence" even if the sentence has been executed, i.e., the correctional authorities have taken custody of the defendant. Leathers, 271 Or. at 240 (if an executed "sentence is void for lack of sentencing authority," the trial court retains authority to correct it). See especially State v. Cotton, 240 Or. 252, 253-54, 400 P.2d 1022 (1965) (where applicable statute mandated imprisonment in state penitentiary, court erred in sentencing defendant to one year in county jail; moreover, court validly corrected the place of incarceration and increased the length of incarceration to three years, for "[t]he original sentence was void and it was the duty of the trial court when the error was called to its attention, or on its own motion, to impose a valid sentence").

This body of Oregon law establishes that if Judge Sawyer now were to determine that Measure 11 is unconstitutional, that determination would establish that the 75-month sentence he was

forced to impose at resentencing is legislatively unauthorized, and that the corrected judgment is void. Sawyer, 324 Or. at 615.

For example, just as "an agency can withdraw an order completely," Riggs, 319 Or. at 293, a court can overrule a prior decision which is not secured by stare decisis. See, e.g., Hammond v. Central Lane Communications Center, 312 Or. 17, 26, 816 P.2d 593 (1991). Suppose that in a subsequent case, the Oregon Supreme Court were to overrule its decision in Sawyer, and hold that Measure 11 is invalid under the Guarantee Clause. That invalidation would inform Judge Sawyer that Vanzant's Measure 11 sentence is unauthorized and void. Moreover, it would inform the judge that he now has the power and duty, upon motion or sua sponte, "to take corrective action and to impose a valid sentence," e.g., the 20-month guidelines sentence he originally imposed. Leathers, 271 Or. at 240; Cotton, 240 Or. at 254.

Furthermore, the judge's duty to take corrective action and to impose a valid sentence would not rest solely on state law. It also would rest on federal law. In the above hypothetical, the federal constitution's Guarantee Clause is the basis for invalidating Measure 11. Therefore, the federal constitution would oblige the judge to fulfill his duty of taking corrective action and imposing a valid sentence. U.S. Const. Art. VI ("[t]his Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby"). See also Howlett v. Rose, 496 U.S. 356, 367 (1990).

Except for one thing: If the hypothetical were to become reality, Judge Sawyer could not fulfill his state and federal duty. For if he did, he would be subject to sanction by the Oregon Supreme Court, vis à vis its peremptory writ of mandamus. So before fulfilling his duty, he first would have to secure dismissal of the writ.

Precisely the same thing must be said about Judge Sawyer's case as it now stands. If the judge were to achieve what he ultimately seeks--the invalidation of Measure 11 under his Guarantee Clause claim--the Oregon Supreme Court would dismiss the peremptory writ. This dismissal would free the judge to fulfill his state and federal duty of replacing the invalid, 75-month Measure 11 sentence with a valid guidelines sentence (e.g., the 20-month sentence the judge originally imposed). Thus, the peremptory writ "has a continuing effect on [Judge Sawyer's] actions vis-a-vis [Vanzant]." Norblad, 320 Or. at 312.

In sum, this case presents a viable issue: The validity of Measure 11 under the Guarantee Clause. The judge has **and will have** a legally cognizable interest in that issue until his power and duty to correct Vanzant's Measure 11 sentence come to an end. U.S. Const. Art. VI; Howlett, 496 U.S. at 367; Sawyer, 324 Or. at 615; Leathers, 271 Or. at 240; Cotton, 240 Or. at 254. Unless "the Governor of [Oregon] should pardon" Vanzant sometime sooner, Mancusi v. Stubbs, 408 U.S. 204, 206 n. 1 (1972), the judge's power and duty will not end until sometime next century, when Vanzant completes the 75-month term.[1] State v. Swikert, 65 Or. 286, 288, 132 P. 709 (1913) (claims against judgment of imprisonment are viable for duration of judgment's effectiveness); State v. Lincoln, 5 Or. App. 138, 140-41, 483 P.2d 92 (1971) (where defendant completed prison term and suffered no collateral consequences from it, his challenge to validity of term's duration was moot). "Accordingly, the dispute

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[1] Vanzant committed his crime and was arrested for it on June 18, 1995. Sawyer, 324 Or. at 599. Because he could not make bail, he stayed in custody. Telephone interview with Jeannie Barrows, records deputy of the Jackson County Jail (Oct. 10, 1997). He thus began serving his 75-month sentence on June 18, 1995. North Carolina v. Pearce, 395 U.S. 711, 718-19 (1969). September 18, 2001 is 75 months after Vanzant's initial custody date, so it is the earliest possible date Vanzant could complete the prison term.

is not moot." Norblad, 320 Or. at 312. Accord Church of Scientology v. United States, 506 U.S. 9, 14 (1992).

Finally, the fact that at resentencing Judge Sawyer imposed a Measure 11 sentence has no bearing on whether this case is moot. The state itself concedes that the judge acted under threat of sanction by the Oregon Supreme Court. This Court has explained that if a petitioner's "'action was merely obedience to the judgment now here for review,'" the action does not moot out the case. Mancusi, 408 U.S. at 207 (quoting Bakery Drivers v. Wagshal, 333 U.S. 437, 442 (1948)).

B. No Deference to Vanzant's Wishes

The state makes a secondary claim that the judge's deference to Vanzant's desire for immediate execution of his Measure 11 sentence moots the case. Brief in Opposition at 9 n. 8. Pertinent Oregon law defeats that claim.

The Oregon Criminal Code states:

> **Except when a person is convicted of a felony committed on or after November 1, 1989**, if the court is of the opinion that it is in the best interests of the public as well as of the defendant, the court may suspend the . . . execution of any part of a sentence . . . .

Or. Rev. Stat. § 137.010(3) (emphasis added).

This statute means what it says: A trial court **may not** suspend execution of a sentence for a felony committed on or after November 1, 1989. Id. See also 29 Op. Att'y Gen. 157, 158 (Ore. 1959) (absent express statutory authority, trial court cannot suspend execution of sentence). Defendant Vanzant committed a Class B felony on June 18, 1995. Sawyer, 324 Or. at 599 and n. 1. Thus, Judge Sawyer imposed sentence for a felony committed **after November 1, 1989**. Owing to the crime date, the judge lacked authority to suspend execution of

Vanzant's sentence. Or. Rev. Stat. § 137.010(3); 29 Op. Att'y Gen. at 158. So even if Vanzant had wanted a suspension of execution, the judge could not have deferred to Vanzant's wishes, for the judge lacked authority to do anything other than execute the sentence. The state's secondary basis for its mootness claim fails.

C. The Judge's Standing

For the same reason it claims Judge Sawyer has no legally cognizable interest in the issue in his case, the state also suggests the judge lacks standing. Brief in Opposition at 5-7. Likewise, for the same reason the judge has a legally cognizable interest, he also has standing.

Presently, there is no ruling on the merits of Judge Sawyer's claim that Measure 11 is invalid under the Guarantee Clause. Whether a state court has jurisdiction to pass on such a claim is the issue before this Court.

The Oregon Supreme Court's peremptory writ threatens Judge Sawyer with sanctions if he were to declare Measure 11 invalid under the Guarantee Clause, and then replace Bobby Ron Vanzant's Measure 11 sentence with a guidelines sentence. The writ thus enjoins the judge from exercising his power and fulfilling his duty of correcting an invalid sentence. U.S. Const. Art. VI; Howlett, 496 U.S. at 367; Sawyer, 324 Or. at 615; Leathers, 271 Or. at 240; Cotton, 240 Or. at 254. The writ causes the judge "direct, specific, and concrete injury," thereby

establishing his standing to petition for certiorari. Asarco Inc. v. Kadish, 490 U.S. 605, 623-24 (1989).

Respectfully submitted,

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